IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 827 of 2005

WITH

CIVIL APPLICATION NO.970 of 2005

Vijay Parmanand Pancholi & Anr. .. Appellant

versus

MHADA & others .. Respondents

...

Mr.A.V. Anturkar with Rajendra Mishra for the appellant.

Mr.S.V. More for the respondent no.1.

Mr.J. Reis with Mr.Yadunath Choudhary for the rrespondent nos.2 to 12.

CORAM : B.H. MARLAPALLE,J

DATED : 14th October 2005

P.C.:

1. Heard Mr.A.V. Anturkar with Mr.Mishra, the learned counsel for the appellant plaintiffs and

Mr.Reis with Mr. Choudhary for the respondent nos.2 to 12 and Mr.More, the learned AGP. This appeal arises from the order dated 26th July 2005 passed by the learned Judge of the City Civil Court dismissing Notice of Motion no.3567 of 2004 filed in L.C. Suit no. 4434 of 2004.

2. The plaintiffs approached the trial Court for the relief of the mandatory injunction against the installation of lift, flattening of roof and widening of staircase in the building known as "Shanti Darshan" located at 76/80, Jail Road, Dongri (East), Mumbai 400 009. The said building has ground plus three floors and it is mostly residential but there are some premises which are used as commercial on the front portion of the building. It originally belonged to Ozabhai Allarakhaji Trust and there are tenants on the ground floor as well as two upper floors whereas the third floor came to be purchased by a Trust known as "Shri Shwetambar Tapagachiya Moortipoojak Rajasthan Jain Sangh" and the said third floor was converted into a Jain Derasar by the owners i.e. the successor trust. The building being more than 90 years old required urgent repairs and therefore, all the tenants came together and

approached MHADA for carrying out the repairs. The tenants selected both the plaintiffs and defendant no.2 Shri Devarchand Chunilal Jain to jointly and unitedly apply to MHADA and all the tenants had given consent whereupon MHADA selected and appointed the plaintiffs and defendant no.2 as the NOC holders responsible for redevelopment, repairs and reconstruction of the suit building in its supervision and through Architect and Contractors selected and appointed from the panel of MHADA. Almost 60% of the repair work was completed and while the balance repair work was in progress, the plaintiffs came to know that some digging work at the site was being carried out by some persons appointed by the contractor on 2nd July 2003 and on further enquiries, they learnt that the said work related to the installation of lift, flattening of the roof and widening of the staircase at the instance of the owners of the third floor. viz. the defendant no.13. Along with the suit, they filed Notice of Motion praying for temporary injunction against the installation of lift and flattening of roof etc. The learned Judge of the trial Court was of the view that the plaintiffs failed to make out a prima facie case in their support. It appears that the trial Court

was overwhelmed by the status of the plaintiffs as NOC holders and it appears to have used avoidable harsh language against the plaintiffs.

3. The main prayer in the Notice of Motion dismissed by the trial Court is for temporary stay against the installation of lift, widening of staircase and flattening of roof. However, in paragraph no.14 of the plaint itself, the plaintiffs themselves stated that the lift installation construction was completed whereas the flattening of the roof and widening of the staircase was yet to start. As per the defendant no.13, it has obtained due permissions from the respondent no.14 Corporation including the commencement certificate dated 14th May 2003. The plaintiffs have also relied upon the reports dated 14th August 2003 and 23rd August 2003 made and submitted by M/s.Poonager Billimoria & Co. who were appointed as Architects for the repair work to be undertaken with the permission from MHADA. These reports of the experts support the case of the plaintiffs that the installation of the lift has resulted in blocking windows of some flats hereby affecting ventilation as well as sunlight. The reports also state that the suit building being upto

or less than 16 meters in height does not require a lift to be installed and the work of flattening of roof was undertaken with an intention to facilitate the installation of the lift. The reasoning given by the trial Court in dismissing the Notice of Motion is unsustainable. It appears that the trial Court did not consider the pleadings of the plaintiffs in paragraph nos.6, 7, 11 and 12 of the plaint. The plaintiffs are mostly merely NOC holders and infact they are the residents of the suit building and their interest is not limited to completion of the repair work and disappear from the suit building. They are the residents of the suit building and they apprehend that their easementary rights are likely to be seriously injured.

4. However, as admitted by the plaintiffs themselves the construction work of lift is already over and it is in the interest of all the tenants that the staircase is widened without affecting any easementary rights of the tenants. During the course of the trial Court of the suit if it is proved by evidence and on the basis of the evidence of the expert witnesses that the installation of lift has affected the easementary rights of the tenants in any

way, the trial Court is not estopped from directing the removal of the lift or suitable alteration to the existing structure of the lift to protect the rights of the tenements and other occupants of the ground and two upper floors. Nonetheless, it does appear that the respondent no.13 Corporation has not examined the location of the building, its present structure and necessity to install the lift viz-a-vis its rules i.e. D.C. Rules. These aspects will ave to be gone into by the trial Court during the trial of the suit and it is for the defendants to be aware that the installation of the lift and other work undertaken by them pursuant to the commencement certificate shall be subject to the decision in the suit and they shall not claim any equity if the suit is decided against them. Therefore, there is no necessity as at present to consider the Notice of Motion filed by the plaintiffs and which has been dismissed by the trial Court though for untenable reasons.

5. The appeal is therefore disposed off with the directions that the S.C. Suit no.4334 of 2003 shall be tried and decided expeditiously and the work undertaken pursuant to the commencement certificate

dated 14.5.2003 shall be subject to the outcome of the suit and at the risk of the defendants. The defendant shall not be entitled to claim any equity if the suit is decided against them.

6. Mr.Anturkar, the learned counsel for the plaintiffs prays for status quo to be continued for eight weeks. Status quo be continued for six weeks, from today.

7. Civil Application does not survive.

B.H. MARLAPALLE, J